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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

TIMOTHY A. DeWITT, ET AL.,
APPELLANTS

v.

PETE WILSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Plaintiffs' appeal of the three-judge panel's decision denying plaintiffs' application for preliminary injunction and entering final judgment dismissing each of the first, second, and third causes of action presented in this case presents the following questions to be decided:

1. Whether deviations in the numbers of duly registered and actual state and federal voters across different racial districts of as high as SIX or SEVEN to one (600 or 700%) are so bizarre on their face, and/or inconsistent with the traditional districting principle of voting or electoral equality, that -- together with a direct statement from the special masters who formulated the plans that one of their primary or first

objectives was to create special racial districts -- the plans producing such deviations cannot rationally be understood as anything other than an effort to separate or segregate voters (and presumably candidates) on the basis of race or ethnic background in violation the Court's decision in Brown v. Board of Education.

2. Whether race-based redistricting, absent compelling justification, violates the equal protection provisions of the Fourteenth and Fifteenth Amendments. U.S. Const., amends. XIV and XV.

3. Whether racial redistricting plans which have the effect of concentrating, or "packing," registered and actual state and federal voters in special majority White or Anglo

districts in comparatively high-turnout suburban and rural regions of the State, thereby apportioning as much as SIX to SEVEN times more voting or electoral influence to members of selected minority racial and ethnic groups in urban areas of the State, impermissibly dilutes the voting strength of suburban and rural White or Anglo voters in violation of the equal protection provisions of the Fourteenth and Fifteenth Amendments.

4. Whether state-legislative and congressional districting plans that produce deviations in actual voting strength from district to district of as a high as SIX or SEVEN to one (600 or 700%) discriminate against voters in high-turnout districts or regions of the State on the basis of location of personal residence in violation of the

principle of "one person, one vote."

5. Whether, as applied to separate congressional election districts, the single-office candidacy restrictions contained in Section 6402(b) of the California Elections Code violate the Candidate Qualifications Clause (art. I, § 2, cl. 2), or impermissibly discriminate against challenger candidates and their supporters in favor of incumbents and their supporters in violation of the Free Speech Clause of the First Amendment of the U.S. Constitution (amend. I).

6. Whether the term limitations imposed by Section 25003(a)(1) of the California Elections Code violate the Candidate Qualifications Clause of the U.S. Constitution. Art. I, sec. 2, cl. 2.

PARTIES TO THE PROCEEDINGS

The appellants here, who were plaintiffs in the district court, are Timothy A. DeWitt and Stephen J. DeWitt, both residents and qualified and registered state and federal voters, and qualified federal candidates, from the State of California.

The appellees in this Court, defendants below, are Pete Wilson, Governor of the State of California, and Anthony Miller, acting Secretary of State of the State of California.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (App. A, infra), is not yet reported.

JURISDICTION

The judgment of the three-judge district court (App. B, infra) was filed

on May 17, 1993. The notice of direct appeal (App. C, infra) was filed on June 8, 1994. The opinion of the district court was released on June 28, 1994. The appellate jurisdiction of this Court is invoked under 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Voter Qualifications Clause, art. I, § 2, cl. 1; Candidate Qualifications Clause, art. I, § 2, cl. 2; Speech Clause of the First Amendment, amend. I; Equal Protection Clause of the Fourteenth Amendment, amend. XIV, § 1; and Fifteenth Amendment, amend. XV, of the United States Constitution; as well as Secs. 6402(b) and 25003(a) of the California Elections Code, are reproduced at App. D, infra.

STATEMENT

In this action, Appellants here, the Plaintiffs below, challenge the constitutionality of California's recently enacted term limitations statute, California Elections Code section 25003(a); its longstanding prohibition against candidates running in more than one congressional district contest at the same election, Elections Code section 6402(b); and California's 1992 state-legislative and congressional redistricting plans. See Wilson v. Eu, 1 Cal.4th 707, 4 Cal. Rptr. 2d 379, 823 P.2d 545 (1992).

Appellants alleged in their complaint, and argued below, that the single-office and term limitation

candidacy restrictions in secs. 6402(b) and 25003(a) of the state elections code both violate Article I, section 2, clause 2, the "Candidate Qualifications Clause," of the U.S. Constitution, and additionally that restricting challenger candidates to just one of California's fully 52 congressional district contests in the same election violates the Free Speech Clause of the First Amendment by favoring the class of incumbent candidates and their supporters over challengers and their supporters.

Finally, in their third cause of action, appellants challenged California's 1992 state and federal legislative redistrictings on the grounds that the state special masters' direct use of race and ethnicity in forming the new plans impermissibly separated, or

segregated, voters and candidates into different districts on the basis of race and ethnicity in violation of the Court's landmark decision in Brown v. Board of Education (1954), and established impermissible racial and ethnic quotas, in violation of Bakke v. U.C. Regents (1978). In addition, Appellants alleged that severe arithmetical deviations (of approximately six to one, or 600%) in actual voter turnout, or actual voting strength, across different racial districts, in both the state and congressional plans, violated the fundamental principle of "one person, one vote", whether viewed from the perspective simply of traditional location of residence, or more disturbingly now with California's new racial redistrictings, race and ethnicity

as well.

Defendant state officials Pete Wilson, Governor, and March Fong Eu, Secretary of State, filed a Fed. R. Civ. P. Rule 12(b)(6) motion to dismiss each of the three causes of action, including Art. III federal court justiciability objections to each of the term limitation and single-office candidacy restriction claims.

On or about September 3, 1993, District Court Judge Edward J. Garcia, the district judge to whom the case was initially assigned at the time the complaint was filed, sitting as a single judge -- without jurisdiction in what was, under the provisions of 28 U.S.C. section 2284(a) (imposing immediate obligation to certify cases to be heard and determined by three judges) clearly a

three-judge case -- without ruling on the merits, entered an interlocutory judgment from the bench, granting defendants' 12(b)(6) motion to dismiss with respect to Plaintiffs' first two causes of action om standing and ripeness grounds. After announcing his decision dismissing the first two causes of action, Judge Garcia, pursuant to 28 U.S.C. section 2284(a), then immediately certified the case as one to be heard and determined by a panel of three judges. See Scheduling Order, filed October 23, 1993, at App. B.

A hearing on cross motions for summary judgment was conducted on January 7, 1993, before a panel of three judges. After the hearing, approximately three and one-half months passed with no word from the court concerning disposition of the plaintiffs' third cause of action.

On or about April 19, 1994, appellants filed an application for preliminary injunction to enjoin California's ongoing 1994 legislative elections being conducted by Defendants pursuant to the challenged racially segregative and severely malapportioned plans. This application also contained a motion for reconsideration of Judge Garcia's earlier interlocutory dismissal of plaintiffs' challenge to single-office restrictions in elections code section 6402(b). Judge Garcia's jurisdictional objection in September 1993 to this cause of action had been that no one had ever attempted to run in more than one congressional district at the same election, so the State had never actually prevented any qualified individual from becoming such a candidate. Both in February and again in

April, 1994, however, plaintiff Timothy A. DeWitt did attempt to become a candidate for federal Congress in more than one district simultaneously, and local election officials, acting under the supervision of defendants, did prevent him from doing so. Specifically, they blocked plaintiff DeWitt from taking out necessary nomination papers to become, on these separate occasions, both a ballot-certified (in February) and write-in (in April) candidate for Congress for more than one district inthe smae election. See Decl. of Timothy A. DeWitt, attached as App. A to Plaintiffs' Application for Preliminary Injunction, in the district court below.

In response to Plaintiffs' Application for Preliminary Injunction and motion for reconsideration, the

three-judge panel issued a summary order on or about May 17, 1994, granting Defendants' motion for summary judgment from the January 7, 1994, hearing, and, again inexplicably in Appellants' view, declaring the application for preliminary injunction, including the motion for reconsideration with respect to the second cause of action, "moot." See Order, filed May 17, 1994, at App. B.

Finally, on or about June 28, 1994, the three-judge panel, per Circuit Judge Procter Hug of the Ninth Circuit Court of Appeals, issued a formal written opinion providing the reasoning behind its disposition of the third, or redistricting, cause of action in the case. The Court declared California's plans to be merely "race-conscious" and reasoned in effect that the absence of

severely irregularly shaped individual districts was itself sufficient to eliminate any legally cognizable concerns of "political apartheid," "racial gerrymandering," "race-based districting," or the like. Memorandum Opinion and Order, at App. A. Notably, the district court failed even to respond to the core allegations in the instant case. Appellants here alleged simply that drawing districts in part directly on the basis of race impermissibly segregated voters and candidates into different districts, and election contests, on the basis of race (in violation of Brown v. Board of Education (1954)), and established racial quotas for California's legislative elections (in violation of Bakke v. Regents of the University of California (1978)). The

concept of "racial gerrymandering" which forms the core of the district court's analysis, it is important to note, formed no part of the plaintiffs' allegations in this case. Further, in response to plaintiffs' very serious claim that, under the current plans, some voters enjoyed up to SIX TIMES the voting influence of other voters across the State -- both on the basis of location of residence, and now, race and ethnic background as well -- the district court responded only that: "There is no merit to this contention; population, not voter registration, is the appropriate basis for apportioning districts." Memorandum Opinion and Order, App. A, at p. 29 (citing Reynolds v. Sims, 377 U.S. 533,

568 (1964)).[1]

Pursuant to 28 U.S.C. sections 1253 & 2284(a), as well as Fed. R. Civ. P. Rule 54(b), appellants now bring this appeal requesting the Court to reverse the district court's (1) denial of the Application for Preliminary Injunction of April 19, 1994, and (2) final judgment, with its summary order of May 17, 1994, dismissing each of their first, second, and third causes of action in this case, for the reasons set forth below:

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[1] Compare, however, analysis and conclusions presented in Reader, One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts, 17 Harv. J. of Law & Pub. Pol'y 521, 522-23 (1994) ("When political redistricting plans that place an equal number of people in all districts do not provide substantially equally-weighted voting, the decisions of legislatures and courts to use a total population basis rather than a voter population basis to form districts is clearly at odds with the Reynolds rationale." (citations omitted)).

I. RACE-BASED DISTRICTING CREATES RACIAL AND ETHNIC QUOTAS IN CALIFORNIA LEGISLATIVE AND CONGRESSIONAL ELECTIONS AND SEGREGATES VOTERS AND CANDIDATES ALONG RACIAL AND ETHNIC LINES IN VIOLATION OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In the case of Shaw v. Reno, __ U.S. __, 113 S. Ct. 2816 (1993), the Supreme Court concluded that, in the absence of compelling State justification, legislative redistricting plans that, in the Court's words, "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race...," (113 S. Ct., at 2828) violate the Equal Protection Clause of the U.S. Constitution (Amend. XIV, sec. 1). The Court had before it the State of North Carolina's 1992 congressional

districting plan. On the basis simply of the "bizarre" geographical shape and configuration of two of the State's new "majority-minority" districts (1st and 12th C.D.s of North Carolina), the Court concluded that the appellants had indeed stated a legally cognizable claim that the districting plan was drawn on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment. Id. at 2828.

The Supreme Court's decision in Shaw has direct application to the present case. Here, however, the "evidence" that California's state legislative and congressional constituted "an effort to separate voters into different districts on the basis of race" (id.) is much more direct. It comes simply from the direct admission of the

line drawers themselves.[2] The special masters selected to formulate California's 1992 redistricting maps reported to the California Supreme Court that literally their first operational objective in drawing the plans was to create special racial minority districts. See Wilson v. Eu, 1 Cal.4th 707, 733 [4 Cal. Rptr. 2d 379, 823 P.2d 545] (1992) (Mosk, J., diss., citing special masters' report, id. at 769-70).[3]

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[2] Cf. Hays v. State of Louisiana, 839 F. Supp. 1188 (W.D. La. 1993) (considering direct evidence in the form of testimony from various state legislators that race was a factor in formulating congressional districting plan invalidated by court).

[3] Pursuant to Federal Rules of Evidence 201, plaintiff-appellants requested that the District Court take judicial notice of the California Supreme Court's opinion (together with the accompanying report of the special masters) announcing the formulation of California's 1992 state legislative and congressional redistricting plans.

The instant challenge thus raises a very similar question to that presented in the recently decided Shaw case: namely, whether the California Supreme Court's population- and race-based congressional and state-legislative redistricting plans -- which the November 1992 election now also reveals cause deviations in actual votes cast across various racial districts of more than six to one (or 600%) -- create impermissible racial and ethnic quotas and/or impermissibly segregate voters and candidates on the basis of race and ethnic background.

A. No Authority Exists for Use of Racial and Ethnic Quotas in State and Congressional Redistricting.

As state Justice Mosk recognized at the time, the California Supreme Court's January 1992 redistricting plans create racial and ethnic "quotas" for which there is no authority. As Justice Mosk noted, the court's special masters admitted in their final report that they placed literally primary emphasis on the racial and ethnic identity of voters in the new districts they had established. See Wilson v. Eu, 1 Cal.4th 707, 733 [4 Cal. Rptr. 2d 379, 823 P.2d 545] (1992) (Mosk, J., diss. opin., quoting from special masters' report, id. at 769-70).[4]

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[4] Justice Mosk quotes from the special masters' own report:

The court majority, for its part, responded to Justice Mosk's concern only by noting that (1) no one had raised an objection to racial redistricting in the course of the proceedings in that action, and that (2) in any case, the U.S. Supreme Court would ultimately resolve questions of that nature. Id. at 716, 729.

The entire single-member district system itself, however, rests precisely on the idea of geographically-

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> "Having first constructed *Latino and African-American congressional and state legislative districts*, which occupied a considerable part of the middle of the south-central and eastern parts of the county, the remainder of the districts allocated to Los Angeles County had to be constructed around the periphery; in some instances they became rather *elongated*."

1 Cal.4th, at 733 (emphasis in original) (italics supplied).

based representational quotas. The inhabitants, and voters, of particular districts are both guaranteed, and restricted to, certain fixed quantities of electoral power or influence. In light of this fixed, rigid nature of districts themselves -- and aside from the more fundamental question of the advisability and/or legality of even geographical quotas in competitive elections (cf. unpublished opin. of three-judge court in DeWitt v. Foley, 1992 U.S. Dist. LEXIS 14571 (N.D. Cal.1992), aff'd mem., 113 S. Ct. 1233 (1993) -- any attempt purposely or intentionally to align race and ethnicity with those underlying districts itself automatically results in racial and ethnic quotas. But cf. University of California Regents v. Bakke, 438 U.S. 265

(1978) (invalidating use of quotas in higher education).

In sum, as Justice Mosk recognized at the time, the California Supreme Court's January 1992 race-based state-legislative and congressional districting plans impose impermissible racial and ethnic quotas on California's electoral and political systems in violation of the equal protection provisions of the Fourteenth and Fifteenth Amendments to the United States Constitution.

B. Drawing Mutually Exclusive Districts on Basis of Race and Ethnicity Segregates Voters and Candidates on Basis of Racial and Ethnic Background in Violation of *Brown v. Board of Education* and Its Progeny.

In addition to imposing racial and ethnic "quotas," race-based redistricting also necessarily segregates

all voters and candidates across the State on the basis of race and ethnicity. Allocating voters to mutually exclusive and exhaustive geographical districts on the basis of race and ethnicity necessarily separates or segregates those voters along racial and ethnic lines. Ever since the U.S. Supreme Court's landmark equal protection decision in the case of Brown v. Board of Education, 347 U.S. 483 (1954), however, it has been bedrock constitutional doctrine that purposefully racially separate public institutions are inherently unequal and therefore necessarily automatically violate the Equal Protection Clause of the Fourteenth Amendment. See, e.g., Gayle v. Browder, 352 U.S. 903 (1956) (following Brown and invalidating racially segregated public busing

system).

In sum, in addition to imposing impermissible racial and ethnic "quotas," race-based redistricting also impermissibly segregates voters and candidates by allocating them to purposely racially separate, and therefore inherently unequal, districts in violation of the Fourteenth and Fifteenth Amendments of the Constitution.[5]

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[5] It should be noted that the apparent motivation behind various forms of racial redistricting today -- having persons of particular racial or ethnic background physically present as members of various elected legislative bodies -- could be achieved with absolutely no injury to any other competing Constitutional interests through a variety of alternative forms of non-district, at-large or multi-member election systems. As early as 1872, leading members of the American legal community began recognizing that some forms of at-large elections were simply demonstrably superior to single-member districting systems in terms of allowing minority voting groups of all kinds actually to select members of popularly elected legislative bodies. See Ware, The Machinery of Politics and

II. RACE-BASED REDISTRICTING WHICH PRODUCES SUBSTANTIAL DEVIATIONS IN *ACTUAL VOTES CAST* ACROSS VARIOUS DISTRICTS VIOLATES FUNDAMENTAL RIGHT TO ELECTORAL EQUALITY, OR 'ONE PERSON, ONE VOTE'

The Equal Protection Clause of the Fourteenth Amendment (amend. XIV, sec. 1) and the Voter Qualifications Clause (art. I, sec. 2, cl. 1) of the United States Constitution protect voters' rights to electoral equality in state-legislative and congressional elections, respectively. See Reynolds v. Sims, 377 U.S. 533 (1964) (state-legislative elections) and Wesberry v. Sanders, 376 U.S. 1 (1964) (congressional elections).

Proportional Representation, Amer. L. Rev. (Jan.1872).

In California's November 1992 general election, however, individual voters in the 15th Assembly and 10th Congressional Districts in suburban Contra Costa County (located in northern California) enjoyed as little as one-fifth to one-sixth the electoral influence of individual voters in the 46th Assembly and 33rd Congressional Districts located in urban areas of Los Angeles County (in southern California). A total of only approximately 30,000 and 50,000 voters turned out in the predominantly Hispanic or Latino-American 46th and 33rd districts, respectively, while fully five to six times that many -- 185,000 and 280,000 -- voters participated in the majority-White or Anglo 15th Assembly and 10th Congressional Districts. See Statement

of Vote, Nov. 3, 1992, general election, at App. B to Plaintiffs' Motion for Summary Judgment of July 6, 1993, in the proceedings below.

Taken in the aggregate, the picture is perhaps even more dramatic. In California's November 1992 congressional elections again, each of the approximately 6,776,000 individual votes cast in the 26 districts (electing 26 Representatives) with the highest voter turnout[6] carried sixty-two percent (62%) less weight than each of the corresponding 4,167,000 votes cast in the 26 districts (also electing 26

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[6] Each of the 1st-10th, 12th, 14th, 15th, 19th, 22nd-25th, 29th, 36th, 39th, 45th, 47th-49th, 51st, and 52nd California Congressional Districts all had vote totals higher than the average or typical 210,000 actual votes cast per district. See Statement of Vote, at App. B to Plaintiffs' July 6, 1993, Motion for Summary Judgment below.

Representatives) with the lowest vote totals. To demonstrate the impact of such a severe malapportionment, had each vote cast in California's 1992 congressional elections in fact carried exactly equal weight or influence, the roughly 6,776,000 voters in districts with above-average turnout would have elected fully 32 (as opposed to the current 26) of the total 52 seats available in California's congressional delegation. And the difference between the 26 Representatives such voters currently elect and the 32 seats they would fill under the "one person, one vote" principle represents a swing of roughly six seats, producing a corresponding gap in electoral influence

of fully 12 federal Representatives.[7]

In the landmark case of Wesberry v. Sanders, 376 U.S. 1 (1964), however, Justice Black, writing for the majority, made plain that such dramatic disparities in actual voting influence across a State would contradict the Framers' original concept of voting

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[7] And, perhaps even more disturbingly, each of the approximately 1,590,000 votes cast in the 13 districts with the lowest actual voter turnout across the State enjoyed on average fully 215% the weight or influence of each of the roughly 3,421,000 votes cast in the 13 districts with the highest voter turnout, representing a swing of five (and corresponding gap of 10) seats in California's congressional delegation. Or, in other words, those voters who happen to be living in the 13 districts with the lowest voter turnout in the State (the 16th, 18th, 20th, 26th, 30th, 31st, 33rd, 34th, 35th, 37th, 42nd, 46th, and 50th Congressional Districts) currently elect fully five Representatives who -- by all rights under "one person, one vote" -- ought to be selected by the group of individual voters residing in the 13 districts in the State with the highest voter turnout (the 1st, 2nd, 4th, 6th, 10th, 14th, 15th, 24th, 29th, 36th, 47th, 49th, and 51st districts).

equality. Thus, he noted at one point that:

> [A]s nearly as is practicable one man's vote is to be worth as much as another's. This rule is followed automatically, of course, when representatives are chosen as a group on a statewide basis, as was a widespread practice in the first 50 years of our Nation's history. It would be extraordinary to suggest that in such statewide elections the votes of inhabitants of some parts of the State ... could be weighted at two to three times the value of the votes of people living in more populous parts of the State....

Id. at 7-8 (citations omitted) (emphasis supplied). Similarly here, however, if California were to hold at-large or statewide elections for Congress -- which was indeed, as Justice Black noted, "a widespread practice in the first 50 years of our nation's history" -- each vote cast in the State would automatically carry exactly identical weight. And it

would be equally "extraordinary to suggest" that in such elections each of the 50,000 votes cast in the current 33rd Congressional District in urban Los Angeles County should somehow be weighted at five to six times the value of each of the 280,000 votes cast in, for example, the 10th Congressional District of suburban Contra Costa County.*

The United States Supreme Court's decisions protecting the basic concept of "one person, one vote" in state-legislative and congressional elections are excruciatingly plain. Individual votes cast in separate election districts established to select the membership of a single representative

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* And, further, one hopes it would be outlandish to suggest that those votes should be weighted differently in part precisely on the basis of the racial and ethnic identities of such voters.

legislative body or delegation must, as nearly as practicable, carry equal weight.

As the Court stated in the landmark case of Reynolds v. Sims, 377 U.S. 533 (1964):

> Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. (Id. at 563.)
>
> Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with citizens living in other parts of the State..., (id. at 568)
>
> [T]he basic principle of representative government remains, and must remain, unchanged -- the weight of a citizen's vote cannot be made to depend on where he lives..., (id. at 567) (emphasis supplied.)

And, in the context of

congressional elections, in Wesberry v. Sanders, 376 U.S. 1 (1964), the Court made clear that:

> To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the people.' (Id. at 8) (emphasis supplied.)

And, for local elections, it announced even more specifically that:

> [W]hen members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.

Hadley v. Junior College Dist., 397 U.S. 50, 56 (1970) (emphasis supplied). And it has also stated that:

> [I]n voting for their legislators, all citizens have an equal interest in

> representative democracy, and ... the concept of equal protection therefore requires that their votes be given equal weight.

Lockport v. Citizens for Community Action, 430 U.S. 259, 265 (1977) (emphasis supplied).

In California's current state-legislative and congressional plans, however, districts having identical representation in statewide legislative and congressional delegations (i.e., one seat each), nonetheless hold actual voting strengths that differ or vary from one another by factors as high as six to one (see Statement of Vote, App. B to Plaintiffs' MSJ below). As a result, individual votes cast in different districts across the State carry radically different influence, or weight, over the selection of those statewide

bodies.[9] Indeed, at the extremes, votes cast in districts with the lowest rate of voter participation across the State carry approximately six times the weight of votes in districts with the highest voter turnout.[10]

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[9] In the case of Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir.1990), cert. denied, 111 S. Ct. 681 (1991), a majority of a three-judge panel of the Ninth Circuit Court of Appeals did approve a racial redistricting plan with deviations in voting age population as high as two to one, but, as the panel majority itself recognized, the defendant county never presented a vote dilution, or "one person, one vote," objection to the plan in that case. See id. at 776 ("The County makes no suggestion, however, that the redistricting plan somehow dilutes the voting strength of the Anglo community.") .

[10] And these deviations or variances have a strong distortional impact on the entire system of California politics and government. They lead, among other things, to unavoidable philosophical cleavage between state and federal officials elected in statewide elections (in which each vote cast enjoys exactly equal influence, e.g., Governor, U.S. President, Secretary of State, and U.S. Senators), on the one hand, and all district-based representational bodies (in which, as we have seen, some votes are now weighted as much as six times more heavily than others), on the other.

Over the past thirty years of California political history, for example, partisan Republican candidates have enjoyed considerable success in elections for offices elected in statewide contests (i.e., ones in which all individual votes across the State always carry exactly identical weight, e.g., U.S. President Ronald Reagan, California Governors George Deukmejian and Pete Wilson (also U.S. Senator)). Over the same period, however, never once has the same Republican party been successful in winning even a simple majority of any of the district-based (1) California State Assembly, (2) State Senate, or (3) federal Congressional delegations.

It is undeniable, then, looking at this history, that exclusively population-based districting plans in which individual votes cast in districts having comparatively high voter turnout carry systematically less weight than those in districts with comparatively low vote totals have a dramatic debilitating effect on the structural or institutional integrity of California political and governmental institutions.

As a result of such severe malapportionment, for example, Republican Governors of the State (elected in contests in which all votes always carry exactly identical weight) have repeatedly clashed with uniformly Democrat-held State Senates and Assemblies (elected through district-based contests in which the weight of individual votes always varies wildly across the State).

Similarly at the federal level,

In sum, Plaintiffs are entitled to a declaratory judgment that the California Supreme Court's exclusively population- and race-based redistricting plans, which now produce deviations or variances in actual votes cast from district-to-district of as high as six-to-one across some districts, violate the fundamental constitutional principle of "one person, one vote" protected in both the Equal Protection Clause of the Fourteenth Amendment (for state elections) and the Voter Qualifications Clause (congressional elections) of the United States Constitution. For the same reasons, Plaintiffs are entitled to

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Republican Presidents of the United States strongly supported by Californians in the State's statewide Presidential election nonetheless face fierce opposition from majority-Democrat, district-based federal congressional delegations from the State.

injunctive relief to prevent the Defendants from administering California's upcoming 1994 elections pursuant to those plans.

III. CALIFORNIA'S MANDATE THAT QUALIFIED FEDERAL CANDIDATES RUN FOR ONLY *ONE* OF *FIFTY-TWO* CONGRESSIONAL SEATS AVAILABLE IN ANY GIVEN ELECTION VIOLATES THE CANDIDATE QUALIFICATIONS CLAUSE AND THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

Section 6402(b) of the California Elections Code provides in part that "[n]o person shall file nomination papers ... for more than one office at the same election." Applied to California's congressional elections, however, persons qualified directly in and by the federal Constitution to hold each of California's 52 separate seats in the House of Representatives are nonetheless permitted to seek only <u>one</u> of

those 52 in any given election cycle.

In effect, candidates are disqualified by the State from seeking, and therefore holding, each of the other 51 seats they are fully qualified to hold directly under the United States Constitution. In addition, the single-office candidacy restriction violates the First Amendment of the U.S. Constitution by strongly biasing all congressional elections in favor of incumbent candidates and their supporters and against challenger candidates and their supporters.

A. Fact that a Qualified Federal Candidate is Already Seeking a Congressional Seat in One Part of the State Cannot Be Used to Disqualify Him or Her From Holding, and Therefore Also Seeking, Another Seat in Some Other District Across the State.

California has no authority to impose any qualifications on candidates for the United States Congress. See, e.g., Powell v. McCormack, 395 U.S. 486 (1969) (ethics restrictions invalidated); Thorsted v. Gregoire, 841 F. Supp. 1068 (W.D. Wash.1994), appeals pending sub nom. Thorsted v. Munro, Nos. 94-35222 et al. (9th Cir.) (term limitations invalidated); Hellmann v. Collier, 217 Md. 93, 141 A.2d 908 (1958) (district residency requirement invalidated); State ex rel Eaton v. Schmal, 140 Minn. 219, 167 N.W. 481 (1918) (restriction against convicted felons invalidated).

Clearly, however, if candidates may not be required to live in the district in which they are seeking office (Hellmann), and if States may not bar even convicted felons (Schmal) from representing them in Congress, then California certainly lacks authority to disqualify potential candidates from holding, and thus seeking, any of the remaining 51 seats across the State for which they are otherwise qualified under the federal Constitution merely on the basis that they are already seeking a seat in some other location in the State.

Of course, no one person may hold more than one seat in Congress at the same time. But that in no way means that a candidate is not qualified simultaneously to seek all of those offices for which he or she may be

qualified. American political history makes at least this much clear.

In the early 1800s, as the Supreme Court has recognized, it was commonplace for States to select their congressional delegations through statewide, or at-large, elections (see Wesberry v. Sanders, 376 U.S. 1, 8 (1964) (Black, J., for the Court)). In such statewide elections, however, all candidates automatically seek all of the seats they are qualified to hold -- even though successful candidates each end up holding only one of those seats. And, from the perspective of individual (and especially challenger) candidates and their supporters, it only makes sense that, to maximize their chances of winning, and thus ultimately holding, one seat for which they are qualified, they

would want to seek each and every one of the (identical) congressional seats or offices for which they are qualified.

In sum, California simply lacks authority under the federal Constitution to use the fact of a pre-existing candidacy for Congress in one district in such a manner as to disqualify a qualified federal candidate from seeking, and thus also holding, any one of the remaining 51 seats for which he or she is also qualified. The Plaintiffs in this action are therefore entitled to a declaratory judgment that, applied to elections for the United States House of Representatives, the single-office candidacy restriction contained in section 6402(b) of the California Elections Code violates the Candidate Qualifications Clause of the United

States Constitution.

B. Single-office Candidacy Restriction Strongly Favors Incumbent Candidates by Reducing Competition from the Class of Potential Challengers Across the Entire State at Large.

In the case of Service Employees International Union v. Fair Political Practices Commission, 955 F.2d 1312 (9th Cir.1992), cert. denied, 112 S. Ct. 3057 (1992), a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit invalidated a California state campaign finance law on the grounds that, in effect or operation, it would advantage incumbent candidates and their supporters over challenger candidates and their supporters in the electoral process. The court determined that applying contribution limits on the basis of an election year, rather than election

cycle, would discriminate against challenger candidates who, the trial court found, typically do not decide to run for office until the beginning of each election year.

Similarly here, however, the restriction against running for more than one congressional seat in any given election cycle imposes a disparate burden or effect on challengers and their supporters, as compared to incumbents. First, it simply severely limits, or truncates, the number or quantity of incumbents a challenger may in fact challenge. Obviously, if no candidate may run for more than one seat, no challenger may challenge more than one incumbent. This serves as a major strategic windfall for all incumbents. The size and quality of the class of

challenger candidates competing against any given incumbent is simply severely weakened. This disparate impact or effect in turn severely distorts electoral outcomes -- and thus the first-amendment protected "marketplace of ideas" -- systematically in favor of incumbent ideas and candidates, and against all challengers.[11]

In sum, the restriction contained in section 6402(b) of the California Elections Code that challengers and their supporters may in fact challenge only one of California's fully 52 sitting incumbents in any given election serves as a major strategic windfall for all incumbents (who for

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[11] For other advantages inherent in incumbency, see Chemerinsky, Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency, 49 Ohio St. L.J. 773, 774-81 (1988).

other reasons have no desire themselves to run against fellow incumbent members of Congress), at the expense of all challengers and their supporters, all in plain violation of the First Amendment to the United States Constitution. Plaintiffs are therefore entitled to a declaratory judgment that sec. 6402(b) violates the free speech protections of the First Amendment.

IV. CALIFORNIA LACKS AUTHORITY UNDER FEDERAL CONSTITUTION TO IMPOSE TERM LIMITATIONS ON CANDIDATES FOR THE UNITED STATES CONGRESS

Section 25003(a)(1) of the California Elections Code prohibits the Secretary of State and all other elections officials from, among other things, certifying the ballot candidacy of any person who "[s]eeks to become a

candidate for a seat in the United States House of Representatives, and who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States House of Representatives representing any portion or district of the State of California during six or more of the previous eleven years."

The Candidate Qualifications Clause of the United States Constitution (art. I, sec. 2, cl. 2), however, requires only that a person "shall ... have attained to the Age of twenty five years, and been seven Years a Citizen of the United States, and ..., when elected, be an Inhabitant of that State in which he shall be chosen" before he or she may hold, and thus become a candidate for, membership in the U.S. House of

Representatives.

The case law makes clear that the enumeration of the (1) age, (2) length-of-citizenship, and (3) state-residency requirements for Members of Congress in the United States Constitution themselves prohibit the imposition by Congress or the States of any others. In the case of Powell v. McCormack, 395 U.S. 486 (1969), for example, the U.S. Supreme Court determined that an effort by the House of Representatives to exclude Representative Adam Clayton Powell (D-N.Y.) from that body for alleged ethics violations violated the Candidate Qualifications Clause by imposing an impermissible additional qualification not required by that clause. In reaching that result, the Court emphasized that "[t]he

qualifications of those who may choose [voters] or be chosen [candidates], as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature." Id. at 539 (1969) (quoting from Alexander Hamilton in Federalist Papers No. 60).

And, as recently as February 1994 and September 1992, a federal District Court and the Nevada Supreme Court, respectively, followed the United States Supreme Court's holding in Powell declaring invalid term limitations provisions virtually identical in wording and effect to California's statute here. See Thorsted v. Gregoire, 841 F. Supp. 1068 (W.D. Wash.1994), appeals pending sub nom. Thorsted v. Munro, Nos. 94-35222 et al. (9th Cir.) and Stumpf v. Lau, __

Nev. __, 839 P.2d 120 (Sept. 1992). See also State ex rel Bryant v. Hill, 316 Ark. 251 (March 7, 1994), cert. granted __ S. Ct. __ (June 1994). The Nevada high court finally concluded in the Stumpf case that "[t]he term limits initiative clearly and 'palpably' violates the qualifications clauses of Article I of the United States Constitution. No case authority has been offered in support of the novel proposition that this or any other state has the power to impose qualifications for federal office provided for in the United States Constitution." Id. at 123.

In sum, the term limitations imposed by sec. 25003 of the California Elections Code contravene the plain terms of the article I, section 2, clause 2 of the United States Constitution. At least

one other State has already barred the issue from even appearing on that State's ballot as a popular initiative. Moreover, the mere existence of the restriction (which by its own terms specifically mandates that Defendants enforce it) on California's statute books has a present direct effect on the candidacy plans of hundreds, if not thousands, of actual and potential candidates (including Plaintiff Timothy A. DeWitt here) for Congress across California, and also actively impairs the ability of California's current congressional delegation -- in competition with delegations from all of the other 49 States -- effectively to promote and protect the State's interests in the United States Congress.

In view of the foregoing

considerations, Plaintiffs are entitled to a declaratory judgment that the congressional term limitations imposed by sec. 25003(a)(1) of the California Elections Code violate the Candidate Qualifications Clause of the United States Constitution, art. I, sec. 2, cl. 2.

CONCLUSION

The Court should note probable jurisdiction and reverse the judgment of the district court.

Respectfully submitted,

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August 1994

APPENDIX A

FOR PUBLICATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CIV-S-93-535 EJG JFM

TIMOTHY A. DeWITT and STEPHEN J. DeWITT, Plaintiffs,

vs.

PETE WILSON, Governor of the State California, and ANTHONY MILLER, Secretary of State of the State of California, Defendants.

MEMORANDUM OPINION AND ORDER

[Filed June 27, 1994]

Before: HUG, Circuit Judge, GARCIA, and BURRELL, District Judges.

Opinion by Judge Hug

HUG, Circuit Judge:

Plaintiffs, residents of California qualified and duly registered to vote in the State, filed suit in the district court for the Eastern District of California on March 30, 1993, challenging California's 1992 redistricting plan, adopted by the State in Wilson v. Eu, 823

P.2d 545 (Cal. 1992). Plaintiffs raised three causes of action challenging the constitutionality of the redistricting plan. Claims one and two challenged the constitutionality of California Election Code, section 25003, a term limitation statute, and section 6402(b), a statute permitting candidates to run for only one congressional seat. The third claim for relief alleges that California's redistricting plan relied on race-conscious reapportionment and diluted white voter strength in violation of the Equal Protection Clause of the Fourteenth and Fifteenth Amendments.

The court, sitting with a single judge, dismissed causes one and two as nonjusticiable. Pursuant to 28 U.S.C. § 2284(a), the court certified the reapportionment claim to be heard by a

three judge district court. Pursuant to 28 U.S.C. § 2284(b)(1), the Chief Judge of the United States Court of Appeals for the Ninth Judicial Circuit appointed this panel to hear this case.

The parties filed cross motions for summary judgment. The motions were heard on January 7, 1994. After considering the parties' written and oral arguments, the record, and case law in this matter, we deny plaintiffs' motion for summary judgment and grant the State's motion for summary judgment.

FACTS

On September 23, 1991, Governor Wilson vetoed the California legislature's reapportionment plan. Recognizing the legislative impasse and the importance of having a plan in place

prior to the upcoming 1992 elections, the California Supreme Court issued a mandate and appointed three retired California judges to serve as Special Masters to resolve the election year crisis.

The Masters were directed to hold public hearings to permit the presentation of evidence and argument with respect to proposed plans of reapportionment. Wilson, 823 P.2d at 547. The Masters were further directed to compile a report and recommendation on reapportionment, basing the report on the public hearings and the guiding principles of the Federal Voting Rights Act of 1965, as amended (42 U.S.C. ~ 1973 et seq.), federal law pertinent to redistricting, the provisions of article XXI, section 1 of the California

Constitution, and the criteria developed by an earlier panel of Special Masters for the reapportionment plans adopted by the California Supreme Court in 1973, see Legislature v. Reinecke, 516 P.2d 6 (Ca. 1973). Wilson, 823 P.2d at 549.

The two relevant sections of the Voting Rights Act are sections 2 and 5. Section 2 of the Voting Rights Act forbids state voting procedures which abridge voting rights "on account of race or color" and states that redistricting plans which provide "less opportunity [to minorities] than other members of the electorate to participate in the political process and to elect representatives of their choice" abridge voting rights. 42 U.S.C. § 1973 (Supp. 1994). Section 5 of the Act prohibits a region subject to its provisions from

implementing changes in any "standard, practice, or procedure with respect to voting" without authorization from the United States Attorney General. 42 U.S.C. § 1973(c). Four California counties, Kings, Merced, Monterey, and Yuba, were subject to section 5; and, thus, the Masters had to devise a plan that would gain preclearance.

The state constitutional standards required that the Masters comply with the following redistricting procedures:

> (1) consecutively numbered single-member districts, (2) "reasonably equal" populations among districts of the same type, (3) contiguous districts, and (4) "respect" for the "geographical integrity of any city, county, or city and county, or of any geographical region' to the extent possible without violating the other standards.

Cal. Const. art. XXI, § 1.

The redistricting criteria

established in Reinecke called for:

> (1) equality of population, (2) contiguity and compactness of districts, (3) respect for county and city boundaries, (4) preservation of the integrity of the state's geographical regions, (5) consideration of the "community of interests" of each area, (6) formation of state senatorial districts from adjacent assembly districts ("nesting"), and use of assembly district boundaries in drawing congressional district boundaries, and (7) reliance on the current census, and on undivided census tracts.

Wilson, 823 P.2d at 549.

With these criteria in mind, the Masters conducted six days of public hearings in Sacramento, San Francisco, San Diego, and Los Angeles, and reviewed the transcripts from 12 public hearings held by the California State Senate on redistricting. They also considered 22 proposed redistricting plans submitted

by various public and private organizations. The Masters did not adopt any one of the 22 proposed plans because each of them, in one manner or another, could not satisfy the redistricting criteria the California Supreme Court required to be followed. Thus, the Masters developed their own redistricting plan.

In approving the Masters' Report, the California Supreme Court stated:

> As the Report observes, population equality must be deemed the primary reapportionment criterion, being mandated by the provisions of the federal Constitution. Under the Masters' plans, each legislative district will vary by less than 1 percent from "ideal" equality, while each congressional district will vary by less than 0.25 percent. We find these minor deviations are amply justified by "legitimate state objectives," namely, the need to form reasonably compact

> districts, to use census tracts rather than blocks in forming districts, and to comply with the Voting Rights Act.

Wilson, 823 P.2d at 551-52 (citations omitted).

With regard to the Voting Rights Act, the California Supreme Court stated:

> The Report discusses at length the Masters' close attention to the provisions of the Voting Rights Act, observing that in view of present uncertainties concerning the scope and intent of the act, the Masters "endeavored to draw boundaries that will withstand section 2 challenges under any foreseeable combination of factual circumstances and legal rulings." Their efforts, in this regard, were in part stimulated by the need to provide new districts for the forthcoming June Primary Election. In that connection, the Secretary of State in a brief filed herein urged the Masters to give the Voting Rights Act "the highest possible consideration in order to minimize the risk of challenge and resulting delay."

> Initially, the Masters attempted to reasonably accommodate the interests of every "functionally, geographically compact" minority group of sufficient voting strength to constitute a majority in a single-member district.
>
> As explained by the Masters, the functional aspect of geographical compactness takes into account the presence or absence of a sense of community made possible by open lines of access and communication. We approve the Masters' use of such an approach in determining the compactness of a particular minority group for purposes of assuring its protection under the Voting Rights Act. Id. at 549-50 (citations omitted).

DISCUSSION

Plaintiffs contend that because the Masters' redistricting plan considered race in redrawing the districts, that this constitutes suspect "racial gerrymandering" actionable under the Equal Protection Clause, as set forth in

Shaw v. Reno, U.S. , 125 L. Ed 2d 511 (1993). Plaintiffs further contend that summary judgment should be granted in their favor because the Masters' plan is not, as required by Shaw, narrowly tailored to meet a compelling government interest. We disagree.

In Shaw v. Reno, the Supreme Court held that the appellants pled a cause of action under the Equal Protection Clause of the Fourteenth Amendment based on an allegation that the State of North Carolina had practiced racial gerrymandering when it reapportioned the State's voting districts. 125 L. Ed. 2d at 536. The two congressional districts challenged in Shaw were drawn to create two majority black districts in the state. The plaintiffs in Shaw alleged that the state had created an

unconstitutional racial gerrymander. Their claim was that the North Carolina General Assembly deliberately "create[d] two Congressional Districts in which a majority of black voters was concentrated arbitrarily -- without regard to any other considerations, such as compactness, contiguousness, geographical boundaries, or political subdivisions with the purpose to create Congressional Districts along racial lines and to assure the election of two black representatives to Congress." Id. at 522 (quotations omitted).

The first district challenged in Shaw was somewhat hook shaped. At one end it shot out with finger-like extensions. Id. at 521. It has been compared to a "Rorschach ink-blot test" and a "bug splattered on a windshield" Id.

The second majority black district challenged in Shaw was 16 miles long and for much of its length was no wider than an interstate highway. Id. The district wound its way, in snake-like fashion, gobbling up black enclaves. Id. It passed through 10 counties, divided towns, and, at one point, remained contiguous only because it intersected at a single point with two other districts before crossing over them. Id.

The Court in Shaw defined racial gerrymandering as "the deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes." Id. at 524 (quoting Davis v. Bandemer, 478 U.S. 109 (1986)).[1] It then held that

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[1] To the extent that Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993), gives a broader meaning to racial gerrymandering, we disagree.

the appearance of the anomalous district boundaries was sufficient to state a claim under the Equal Protection Clause for racial gerrymandering.

Shaw held when districts are drawn in such an extremely irregular fashion as to be unexplainable, other than being based solely on race, a claim under the Equal Protection Clause for racial gerrymandering can be stated. Shaw, 125 L. Ed. 2d at 536. Redistricting based solely on race affronts our sense of voter equality because it creates districts with residents who have little in common with each other except the color of their skin. It fails to take into account geographic and political boundaries, age, economic status, and the community in which the people live. Id. at 529. Redistricting based solely

on race assumes that members of the same race think alike, share the same political interests, and prefer the same candidates at the polls, not because of shared community interests, but only because of their skin pigmentation. It is the equivalent of political apartheid. When a district is drawn in such a manner that it rationally can only be understood as race-based, then a cause of action arises under the Equal Protection Clause. Id. at 536. Thus, if an allegation of deliberate and arbitrary redistricting based solely on race is not contradicted by the State, then it must be determined whether the redistricting plan is narrowly tailored to further a compelling governmental interest. Id.

The Court in Shaw specifically noted that "we express no view as to whether

the intentional creation of majority-minority districts, without more, always gives rise to an equal protection claim. We hold only that on the facts of this case, plaintiffs have stated a claim sufficient to defeat the state appellees' motion to dismiss." Id. at 530 (quotation omitted).

The narrow holding of Shaw is that "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." Id. Shaw applies to redistricting plans that on

their face are so dramatically irregular that they can only be explained as attempts to segregate by the races for purposes of voting without regard for traditional redistricting principles. Id. at 52[illegible].

The California redistricting plan does not fit within the narrow holding of Shaw. As the California Supreme Court noted, the Masters' Report sought to balance the many traditional redistricting principles, including the requirements of the Voting Rights Act. Wilson, 823 P.2d at 549. No bizarre boundaries were created. The effort to comply with the Voting Rights Act emphasized geographical compactness, which "takes into account the presence or absence of a sense of community made possible by open lines of access and

communication." Id. This case, therefore, involves the constitutionality of a redistricting plan that created majority-minority districts in a manner that was consistent with traditional redistricting principles, not based solely on race, and not involving extremely irregular district boundaries. It involves the question left open by the Court in Shaw.

As the Court noted in Shaw,

> A reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses. Moreover, redistricting differs from other kinds of state decision making in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors.

Id. at 528. Thus, in redistricting, consciousness of race does not give rise

to a claim of racial gerrymandering when race is considered along with traditional redistricting principles, such as compactness, contiguity, and political boundaries.

Redistricting had been used to dilute minority voting power by spreading minority voters throughout different districts or packing minority voters into a single district. Id. at 524. It is this problem the Voting Rights Act sought to remedy. Consciousness of race in redistricting through the creation of majority-minority districts, properly performed, alleviates this inequity. Thus, the Supreme Court has stated that

> it [is] permissible for a state, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will

> afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford an opportunity of creating districts in which they will be in the majority.

United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 168 (1977).

The Masters did not draw district lines based deliberately and solely on race, with arbitrary distortions of district boundaries. The Masters, in formulating the redistricting plan, properly looked at race, not as the sole criteria in drawing lines but as one of the many factors to be considered. We agree with the California Supreme Court that the Masters' Report evidences a judicious and proper balancing of the many factors appropriate to redistricting, one of which was the consideration of the application of the

Voting Rights Act's objective of assuring that minority voters are not denied the chance to effectively influence the political process.

The Masters' Report carefully analyzed and reconciled the redistricting requirements of the State Constitution, the Reinecke case, and the Voting Rights Act. See Wilson, app. I, 823 P.2d at 571-75. In addition to the fundamental requirement of population equality, the Masters noted the state requirements of contiguity, geographic integrity, community of interest, and compactness. In discussing the application of the latter four traditional redistricting principles, the Masters' Report states:

> These four criteria all are addressed to the same goal, the creation of legislative districts that are effective, both for the represented and the representative. The

> constitutional requirement of "contiguity" is not an abstract or geometric technical phrase. It assumes meaning when seen in combination with concepts of "regional integrity" and "community of interest." . . . . "The territory included within a district should be contiguous and compact, taking into account the availability of transportation and communication." In addition, "social and economic interests common to the population of an area [e.g.] an urban area, a rural area, an industrial area or an agricultural area" should be considered.
>
> . . . . Compactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency. Further, it speaks to relationships that are facilitated by shared interests and by membership in a political community, including a county or city.

Id. at 574-75 (citations and footnotes omitted).

In discussing the particular

relationship of these criteria to the Voting Rights Act, the Masters' Report states:

> We find no conflict between the Act and the above state criteria. Indeed, quite the contrary. As has already been-noted, the Act protects only "geographically compact" minority groups. The major divisions of the state as we have defined them above divide no such minority groups. (The boundary mountain ranges, for example, are virtually unpopulated areas with few roads crossing them; 50 to 100 miles separates populated areas on either side of these ranges.) Similarly, the values expressed in the concept of contiguity, community of interest, and respect for local government boundaries--the concept of "functional compactness"--is completely consistent with the concept of "geographically compact" minority districts. Indeed, use of these criteria reinforces the Act's guarantee to minority groups to have an equal opportunity "to participate in the political process." As suggested above, political effectiveness can be enhanced by membership and

> participation in community affairs: candidates for public office can be recruited and nurtured, local media may be better utilized (including the foreign language press), grassroots organizing and campaigning are more viable. As suggested in the June 1980 ballot arguments in favor of Article XXI, use of these criteria can avoid the creation of "districts that are confusing, unfair and unrepresentative."
>
> In sum, we find the criteria underlying the drawing of district boundaries, i.e., criteria found in the federal and state constitutions, in the Act, and in the decision of the California Supreme Court in Reinecke IV, supra, not only reconcilable, but compatible. The criteria have guided our deliberations and informed our decisions.

Id. at 575 (citations omitted).

Adhering to their definitions of contiguity and compactness, the Masters refused to create districts that wound in snake-like fashion or resembled a

"Rorschach inkblot test" found objectionable in Shaw. This is exemplified in the Masters' refusal to create a district which ran along the Sierra Nevadas where no road exists and where populated areas were separated by 130 miles, and their refusal to "extend a long arm between the Richmond District and 'Chinatown' in order to bring these two areas into the same district." Wilson, 823 P.2d at 577-78, 581 n.44. The Masters noted that these were only two of the many examples of bizarrely shaped districts suggested to them, and that a cogent justification for any bizarre-shaped district would be necessary before they could recommend them. Id. at 577 n.24. Thus, the Masters did not redistrict based solely on race, but showed depth and insight in

considering race as a component of traditional redistricting principles.

We conclude that the Masters' redistricting plan, as approved by the California Supreme Court, is not racial gerrymandering, but rather a thoughtful and fair example of applying traditional redistricting principles, while being conscious of race. Thus, we find that the plaintiffs have failed to state a claim of racial gerrymandering. We conclude that in the context of redistricting, where race is considered only in applying traditional redistricting principles along with the requirements of the Voting Rights Act, that strict scrutiny is not required. However, if it were required, we conclude that this California redistricting plan has been narrowly tailored to meet a

compelling state interest.

The Court has repeatedly emphasized that legislative reapportionment is primarily a matter for state determination. Most recently, in Voinovich v. Quilter, 122 L. Ed. 2d 500, 513 (1993), the Court stated:

> Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But that does not mean that the State's powers are similarly limited. Quite the opposite is true: Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the states, and not the federal courts, to conduct apportionment in the first place. Time and again we have emphasized that "'reapportionment is primarily the duty and responsibility of the State, through its legislature or other body, rather than of a federal court.'"

Id. at 513 (citations omitted). Unless the Voting Rights Act itself is found to be unconstitutional or unless the creation of majority-minority districts, in implementation of that Act, is found to be unconstitutional, it is difficult to see how California's carefully drawn plan, utilizing traditional redistricting principles, while seeking to comply with the requirements of the Voting Rights Act, can violate the Equal Protection Clause. We conclude that the redistricting plan adopted by the California Supreme Court appropriately balances the traditional reapportionment principles, does not involve racial gerrymandering, and does not violate the Fourteenth and Fifteenth Amendments.

The appellants also contend that the reapportionment plan violates the Equal

Protection Clause by unduly minimizing white voter strength. The asserted basis for this contention is that even though the districts are equated as to population, the registered voters in the white majority districts far exceed those in the majority-minority districts, giving greater impact to a vote in the latter districts. There is no merit to this contention; population, not voter registration, is the appropriate basis for apportioning districts. Reynolds v. Sims, 377 U.S. 533, 568 (1964).

ORDER

For the foregoing reasons, plaintiffs' motion for summary judgment is DENIED and defendants' motion for summary judgment is GRANTED. The clerk is directed to enter judgment for the defendants.

IT IS SO ORDERED.

Dated: June 23, 1994

/s/ _____
PROCTER HUG, JR., JUDGE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Dated: June 27, 1994

/s/ _____
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

Dated: June 27, 1994

/s/ _____
GARLAND E. BURRELL, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No. CIV-S-93-535 EJG JFM

TIMOTHY A. DeWITT, et al.,

Plaintiffs,

v.

PETE WILSON, et al.,

Defendants.

[Stamped Filed: May 17, 1994]

ORDER

This matter was before the court on January 7, 1994 for hearing on the parties' cross motions for summary judgment. Timothy DeWitt appeared on behalf of plaintiffs. ShellyAnne Chang appeared on behalf of defendants. The

court now enters the following summary order.

1. Plaintiffs' motion for summary judgment is denied.

2. Defendants' motion for summary judgment is granted.

3. the clerk is directed to enter judgment for defendants.

4. Plaintiffs' motion for a preliminary injunction is now moot and the hearing noticed for May 20, 1994 is vacated.

5. This summary order will be followed by a memorandum opinion of decision.

IT IS SO ORDERED.

Dated: May 13, 1994

/s/ _____
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

Dated: May 13, 1994

/s/ _____
GARLAND E. BURRELL, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No. CIV-S-93-535 EJG JFM

TIMOTHY A. DeWITT; STEPHEN J. DeWITT,

Plaintiffs,

v.

PETE WILSON; MARCH FONG EU,

Defendants.

[Stamped Filed: OCT 22, 1993]

SCHEDULING ORDER

Pursuant to 28 U.S.C. section 2284, a three-judge district court, consisting of the Honorable Proctor R. Hug, Jr., United States Circuit Judge for the Ninth Circuit, the Honorable Edward J. Garcia, United States District Judge for the Eastern District of California, and

Garland E. Burrell, United States District Judge for the Eastern District of California, has been appoited to determine the third cause of action of plaitiffs' complaint which challenges the constitutionality of California's 1992 Redistricting Plan.

Two motions addressed to plaintiffs' third cause of action are presently pending before the court: defendants' Fed. R. Civ. P 12(b)(6) motion to dismiss and plaintiffs' Fed. R. Civ. P. 56 motion for summary judgment. Since the court has dismissed plaintiffs' first and second causes of action by order filed September 7, 1993, plaintiffs' motion for summary judgment as to those causes is moot.

The court now enters the following scheduling order.

1. Having reviewed the file, the court believes that the case may be susceptible to resolution on cross-motions for summary judgment. Moreover, defendants' motion to dismiss apparently raises the affirmative defense of res judicata which requires the consideration of extrinsic evidence. Accordingly, the court, pursuant to Fed. R. Civ. P. 12(b), sua sponte converts defendants' Fed. R. Civ. P 12(b)(6) motion to a Fed. R. Civ. P. 56 motion for summary judgment.

2. Defendants' supplemental briefing on their converted motion for summary judgment shall be filed no later than November 19, 1993. Opposition to each motion shall be filed no later than December 3, 1993. Reply briefs shall be filed no later than December 10, 1993. The parties shall submit one original and

three copies of all filings.

3. A hearing on the parties' cross-motions for summary judgment shall be held on January 7, 1994 at 2:00 p.m. in courtroom number four of the United States District Court for the Eastern District of California.

4. Pursuant to 28 U.S.C. section 2284(b)(2), the clerk shall serve the Governor and the Attorney General of the state of California with a copy of this order by certified mail.

IT IS SO ORDERED.

Dated: October 21, 1993

/s/ _____
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Civil Action No. CIV-S-93-535 EJG JFM

TIMOTHY A. DeWITT and STEPHEN J. DeWITT, Plaintiffs,

vs.

PETE WILSON, Governor of the State California, and ANTHONY MILLER, Secretary of State of the State of California, Defendants.

[Stamped: June 8, 1994]

NOTICE OF APPEAL

TO PETE WILSON, Governor of the State of California, and ANTHONY MILLER, Secretary of State of the State of California, and DANIEL E. LUNGREN, LINDA A. CABATIC, and SHELLEYANNE W.L. CHANG,

their attorneys of record:

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. § 1253, plaintiffs TIMOTHY A. DeWITT and STEPHEN J. DeWITT will and hereby do appeal the district court's action of May 17, 1994, denying plaintiffs' application for preliminary injunction and entering final judgment in the case dismissing each the first, second, and third causes of action presented therein.

Dated: June 6, 1994.

Respectfully submitted,

Arlo Hale Smith -- Bar No. 96971
Timothy A. DeWitt -- Bar No. 150631

By: /s/ _____
Timothy A. DeWitt

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Civil Action No. CIV-S-93-535 EJG JFM

TIMOTHY A. DeWITT and STEPHEN J. DeWITT, Plaintiffs,

vs.

PETE WILSON, Governor of the State California, and ANTHONY MILLER, Secretary of State of the State of California, Defendants.

[Stamped: June 8, 1994]

CERTIFICATE OF SERVICE

I, Timothy A. DeWitt, do hereby certify that on this 7th day of June, 1994, I served the Notice of Appeal filed herewith in the above captioned action by first-class mail, postage prepaid, upon the following:

Shelleyanne W.L. Chang
Deputy Attorney General
P.O. Box 944255
1515 K Street, Ste. 511U
Sacramento, Calif. 94244-2550
(Counsel for Defendants)

/s/
Timothy A. DeWitt

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clauses 1 and 2 of the U.S. Constitution provide that:

> The House of Representatives shall be composed of Members chosen every second Year by the people of the several States, and the Electors in each state shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

2. Amendment I of the U.S. Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3. Amendment XIV, Section 1 of the U.S. Constitution provides in part that:

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Amendment XV, Section 1 of the U.S. Constitution provides that:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

5. California Elections Code section 25003(a) provides in part that:

> [T]he Secretary of State ... shall not [certify for the ballot] the name of any person who ... [s]eeks to become a candidate for the United States House of Representatives, and who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the U.S. House of Representatives ... during six or more of the previous eleven years....

6. California Elections Code section 6402(b) provides in part that:

> No person may file nomination papers ... for more than one office in the same election.